FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
Appellant,

v.

LOUIS J. FIOTO, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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OPINION BELOW

The opinion of the District Court (J.S. App. A, 1a-8a), as amended (J.S. App. B, 9a-10a), is reported at 409 F. Supp. 831.

JURISDICTION

By judgment entered Janaury 26, 1976, a unanimous three-judge District Court of the Eastern District of

New York granted summary judgment for plaintiffs in this action, holding unconstitutional 10 U.S.C. §1331(c) as applied to plaintiff and his class (J.S. App. C, 11a-12a). A notice of appeal to this Court was filed by the Government on February 25, 1976 (J.S. App. D, 13a-14a). On April 19, 1976, Mr. Justice Marshall extended the time for docketing the appeal to and including May 25, 1976. The Government's jurisdictional statement was filed on May 24, 1976, and probable jurisdiction was noted on October 4, 1976 (A. 42). The jurisdiction of this Court is conferred by 28 U.S.C. §§1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the constitutional and statutory provisions set forth in Appellant's Brief, the following statutory provision is involved on this appeal:

Section 302 of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1087, as amended, 10 U.S.C. §1331, provides in pertinent part:

> (e) Notwithstanding Section 8301 of Title 5, United States Code, the date of entitlement to retired pay under this Section shall be the date on which the requirements of subsection (a) have been completed. (added Aug. 13, 1968. Pub. L. 90-485, §2, 82 Stat. 754.)

QUESTIONS PRESENTED

1. Whether, in view of the relevant legislative history as to the purpose of the Army and Air Force Vitalization and Retirement Equalization Act of 1948

(hereinafter "Act"), the proviso at 10 U.S.C. §1331(c) was intended by Congress to constitute a bar to eligibility for retired pay under the Act for an individual who, after August 16, 1945, served the twenty years of satisfactory service required for eligibility under the Act and, in addition, was a member of the National Guard or of the Reserves prior to August 16, 1945 and did not perform active duty during World War I, World War II or the Korean conflict.

2. Whether the proviso at 10 U.S.C. §1331(c), if construed to constitute a bar to eligibility for any retired pay under the Act for such an individual, is on its face and as applied to the plaintiff and plaintiff class members utterly irrational and unconstitutional as violative of the Due Process Clause of the Fifth Amendment.

3. Whether, if the proviso is held not to bar retired pay under the Act for the plaintiff and plaintiff class members, retired pay must be paid to them pursuant to statute as of the date they met all eligibility requirements.

STATEMENT

The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1087, as amended, 10 U.S.C. §1331 *et. seq.*, grants retired pay for reservists and national guardsmen who meet certain age and service requirements including the requirement that they have reached 60 years of age and have served satisfactorily 20 years of service as computed under the service and point system of 10 U.S.C. §1332.

The challenged proviso at 10 U.S.C. §1331(c) states that:

> No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

Plaintiff-Appellee (hereinafter "plaintiff") Fioto is presently retired from service in the United States Army. Plaintiff served in the United States Coast Guard from 1927 to 1931 and served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967 (A. 7, 12). He received an Honorable Discharge on December 9, 1967, having reached the mandatory retirement age of 60 (A. 11). Due to injuries resulting from an automobile accident in 1941, plaintiff did not serve during World War II, nor did he participate in the Korean conflict since his unit was never called to active duty (J.S. App. A at 2a).

It is undisputed that Mr. Fioto has satisfied each of the requirements for retired pay set forth in 10 U.S.C. §1331(a) since he was sixty years old at the time of retirement, had since 1945 completed twenty years of satisfactory service as defined in §1332, and was not entitled to retired pay from the armed forces under any other provision of law. Thus, on September 5, 1967, plaintiff filed an application for retired pay for non-regular service pursuant to 10 U.S.C. §1331(a), which was denied. On February 21, 1974, Mr. Fioto renewed his application which, by letter dated September 25, 1974, the Army Board of Correction of Military Records denied on the ground that he was barred from any entitlement by the terms of the proviso contained at 10 U.S.C. §1331(c) (A. 27).

Mr. Fioto thereupon commenced this action for declaratory and injunctive relief in the United States District Court for the Eastern District of New York, initially seeking class certification and the convening of a three-judge court. The single District Judge determined that a statutory three-judge court must be convened. Prior to the decision of the three-judge court, the District Judge entered an order certifying the class, defined as reservists who have twenty years of qualifying service after August 16, 1945, as computed under the standards in 10 U.S.C. §1332, and are without active wartime duty (A. 38).

The three-judge District Court, in a unanimous opinion by Circuit Judge J. Edward Lumbard, held that, as applied to plaintiff and the members of his class, 10 U.S.C. §1331(c) violates the minimum constitutional requirements imposed by the Due Process Clause of the Fifth Amendment, and granted plaintiff's motion for summary judgment (J.S., App. A at 5a).

The Court found that Congress had "adopted the reasonable requirement that an individual serve twenty 'satisfactory' years, as measured by an objective standard," which is the 50 point per year system set forth at 10 U.S.C. §1332. (*Id.* at 6a, fn. omitted). Because there was no way to measure whether service was "satisfactory" prior to this legislation, Congress sought to discount the years prior to World War II. "An understandable exception was provided for those who had seen active duty during one of the World Wars." (*Id.* at 7a). The District Court concluded that "[t]here is simply no evidence in the legislative history that Congress intended that any pre-1945 service would create a perpetual bar to future benefits." (*Id.* at 7a).

As the Court below recognized, it is undisputed that if plaintiff Fioto's service in the National Guard had been limited to the years 1947 to 1967, he would be entitled to retired pay without any requirement of

active duty. The Court found that Mr. Fioto's additional earlier service from 1933 to 1940 could not constitutionally bar him from entitlement to retired pay, and that Mr. Fioto and members of his class are entitled to receive retired pay based on their twenty satisfactory years of service after 1945.[1]

SUMMARY OF ARGUMENT

While a literal reading of the challenged proviso contained at 10 U.S.C. §1331(c) does appear to perpetually exclude Mr. Fioto and his class from entitlement to any retired pay, that reading of the proviso is manifestly in head-on collision with the clearly and pervasively expressed congressional purpose of the Act to grant retired pay to reservists like Mr. Fioto who have twenty years of satisfactory service after 1945 as measured by the objective standards set forth at 10 U.S.C. §1332. An examination of the relevant legislative history conclusively demonstrates that by the proviso Congress could not have meant to override the purpose of the Act to award retired pay to individuals with twenty years of satisfactory service, by raising an absolute and irrevocable bar to entitlement for benefits against persons like Mr. Fioto who had twenty years of post-1945 satisfactory service and further had additional years of pre-1945 service without active wartime duty. The conclusion is inescapable that in enacting the proviso Congress intended only to disqualify any reservist from receiving credit toward eligibility for retired pay for pre-1945 years of service

[1] The District Court at the Government's request has stayed the payment of retirement benefits to all class members. The Government did not seek a stay of the payment of retirement benefits to the named plaintiff Mr. Fioto.

unless he performed active wartime duty. As found by the District Court, any other construction of the proviso would be unconstitutional as totally at odds with the actual congressional purpose of the Act.

Further, if the restrictive interpretation of the provision which is urged upon this Court by the Government is adopted, then the proviso creates distinctions among similarly situated reservists which are so arbitrary as to violate equal protection and due process principles of the Fifth Amendment. Thus, on the one hand, individuals like Mr. Fioto who have twenty years of satisfactory service in the reserves after 1945 would be denied entitlement to any retired pay solely because they additionally had some earlier pre-1945 years of service but no active duty during wartime. On the other hand, other similarly situated individuals who equally have twenty years of satisfactory service in the reserves after 1945 and as well performed no active duty during time of war are deemed entitled to retired pay because they had no years of service in the reserves prior to 1945. Such discriminatory treatment of similarly situated persons would be utterly irrational when measured against legitimate congressional goals, and hence unconstitutional.

Once 10 U.S.C. §1331(c) is determined not to bar eligibility for retired pay, Mr. Fioto and his class are entitled by statute (10 U.S.C. §1331(e)) to retired pay as of the date eligibility requirements were met by each member of the class.

ARGUMENT

POINT I

THE CHALLENGED PROVISO DOES NOT BAR ENTITLEMENT TO RETIRED PAY UNDER THE ACT FOR PLAINTIFFS WHO HAVE TWENTY SATISFACTORY YEARS OF SERVICE AFTER 1945, SINCE CONGRESS PLAINLY DID NOT INTEND THAT RESULT.

The controlling consideration in resolving the issue before the Court on this appeal is whether Congress, in enacting the Act and the proviso in question, intended to bar entitlement to retired pay for an individual who indisputably has performed twenty satisfactory years of service after 1945, as measured by the objective standards of 10 U.S.C. §1332, but has further had *additional* years of non-wartime service prior to 1945. A careful review of the entire legislative history of the Act and of the proviso makes it abundantly clear that reliance on the apparently "plain meaning" of the proviso to bar all entitlement to benefits for the plaintiffs is not determinative of whether Congress intended that result. As plaintiffs will demonstrate it is manifest that in enacting the proviso Congress did *not* intend to override the fundamental purpose of the Act, as reflected in the legislative history, to award retired benefits to reservists with twenty years of satisfactory service. Rather, Congress by the proviso meant only to deny credit for pre-1945 years of service unless active wartime service was performed. Where, as here, a literal reading of a statutory provision produces an unreasonable result plainly at variance with congressional purpose as a whole, this Court should give effect to the congressional purpose rather than the literal

wording of a provision in determining the meaning of the law. *Accord, Train* v. *Colorado Public Interest Research Group* ___ U.S. ___, 48 L.Ed.2d 434 (1976); *Cass* v. *United States* 417 U.S. 72 (1974); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966); *National Labor Relations Board* v. *Fruit and Vegetable Packers*, 377 U.S. 58 (1964); *Cox* v. *Roth*, 348 U.S. 207 (1955); *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50 (1942); *United States* v. *American Trucking Association*, 310 U.S. 534 (1940).

After analyzing the legislative history, the District Court correctly concluded that the congressional purpose of the Act was to provide retired benefits to reservists who satisfactorily served twenty years, thus creating an incentive to continued, long-term service (J.S., App. A, at 6a).

Tracing the legislative history of the Act from its inception in the House, through the final Senate version in 1948 and subsequent amendments will cogently demonstrate that the application of the challenged proviso to Mr. Fioto is contrary to the congressional purpose of the entire Act.

The purpose of the original House bill was to induce reservists to remain in service for longer periods of time. The sponsor of the measure, Congressman Brooks, stated the problem as follows:

> . . . the government has spent much money in the selection and early training of our reserves who have dropped out before much usefulness can be obtained from the training which they have received. Before World War II it was found that 10 percent of the Army reserve officers left service each year; and at the end of a 10-year period we had almost entirely a new set-up.
>
> 94 Cong. Rec. 2485 (1948)

The House was concerned that the country was losing its trained reservists. They felt "that one trained Reserve was worth five untrained Reserves, and it was actually economy to our Nation to retain in the Reserves the same men, without a mass turnover every year." Brooks, *id.* at 2487. The House decided that men who had dropped out of the reserves were those they especially wished to retain.

> . . . [I]t is pertinent to point out that during the hearings on H.R. 2744 it was stressed by practically every witness who testified concerning the Reserve retirement provision of this bill that the most effective type of Reserve force is one which is manned by personnel who have had extensive training over a period of years—not 2 or 3 years, but 10, 15 or 20 years.
>
> Congressman Van Zandt, *id.* at 2491.

In order to rectify the situation, a retirement system was created to encourage continued service of reservists who had extensive training.

> One answer has been the suggestion of inactive duty training pay. Of course, this does help in the recruitment problems. It is not the answer to the problem of holding the interest and activity of the Reserve, both enlisted and officer, after he has entered the Reserve and become fairly well trained. We feel that a modest retirement system is the answer.
>
> Congressman Brooks *id.* at 2485.

As noted in the House Report, the purpose of this legislation was to keep men in the reserve for a continuous period of service.[2]

[2] The purpose of the Act was not to induce men to enlist in the reserves for the first time. Government's Brief, at 13. That purpose was served by separate legislation passed by the House on March 9, 1948 (S.1174, 80th Cong., 1st Sess., 94 Cong. Rec. 2416 (1948)) which provided for payment to reservists for inactive duty training. The Bill was enacted as Pub. L. No. 80-460, 62 Stat. 87 on March 25, 1948. *Id.* at 3575.

> The underlying purpose in writing this policy as to reserve components into law is that the retirement benefits will furnish an incentive that will hold men in the reserve Components for a longer period of time. . . .
>
> H.R. Report 816, 80th Cong. 1st Sess. (1947) at 11.

The legislation as it passed the House conferred a retirement benefit for Reserve service but did not contain either the point system to measure satisfactory service or the challenged proviso. The House version prescribed a complicated computation formula for calculating eligibility for retirement benefits and left determination of the precise standards to the individual branches of the Reserves. 94 Cong. Rec. 2496-2497 (1948).

When the Bill was sent to the Senate, the Senate Committee for Armed Services held hearings, and recommendations concurred in by the Armed Services and Committee staff were proposed. The Senate Committee was concerned with the fiscal implications of the bill and the need for uniform and improved training standards among the branches of the Reserves. To accomplish this result the Senate added a section with a uniform point system to measure a year of satisfactory service in preference to leaving that measurement to the various military branches.[3] The same section added the proviso challenged here.

The meaning of the proviso cannot be discerned without reference to the purpose and the legislative history of the Act. The Senate Report sets out the purpose of that Section:

[3] The objective standards for satisfactory service adopted by Congress are set forth in 10 U.S.C. §1332; the District Court sets them forth at fn. 6 (J.S., App. A at 6a).

> Title III, this title has been amended substantially in an effort to cut down the potential costs of the title and in order to insure an improvement in the training requirement of Reserves who wish to quality for benefits. The Bill as it passed the House had a maximum potential cost of $400,000,000 per year. As amended, the maximum potential cost is approximately $18,000,000 per year. The standard for retirement qualifications under this title have been so set that it definitely eliminates from the benefits of this title the Reserve who does not render diligent service for 20 years. . . .
>
> S. Rept. 1543 80th Cong., 2d Sess. (1948) at 2.

By its amendments, the Senate enumerated **criteria** for 20 years of satisfactory service, but clearly never intended to change the purpose of the House Bill which was to induce long term reserve service.

> The amendments that are suggested to the bill since it passed the House are all perfecting amendments; none of them change the intent or purpose of the bill as it passed the House.
>
> Statement of Col. Melvin J. Maas, Hearings on H.R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess. (1948) at 23.

Cf. Cass v. *United States*, 417 U.S. 72, 81-82 (1974).

The Senate amendments were aimed at setting out a statutory definition of "satisfactory" service rather than leaving it to administrative regulations to be promulgated by the various branches of Service:

> The plan [the Senate amendments] differs markedly from the House in this degree, that each of them require 20 years of so-called satisfactory service. The House version left the term "satisfactory" to be defined by regulations. We have

> written into this law, and the Reserves have agreed to it, certain standards which are going to be extremely difficult to meet, and these are spelled out in the law.
>
> Statement of J.M. Chambers, member of the Committee Staff, Senate Hearings, *supra* at 66.

The Senate amendments created a system *in futuro* to measure reserve service in each year and to determine whether it was satisfactory. Under the standard thereby established, 50 qualifying points must be earned to gain a year of satisfactory service. Failing to earn 50 points in one or more years did not act as a permanent bar to benefits. All that was required of anyone to become entitled to benefits was 20 years of satisfactory service after 1945.

> Sen. Saltonstal. Just to supplement what you say, a man today has got to get 50 points a year for 20 years. If he misses out through sickness or anything else, in any 1 year, in attaining his 50 points he is out of luck on his retirement. Am I correct?
>
> Mr. Chambers. That is correct. He is out of luck insofar as that one year is concerned.
>
> Senator Hill. He could pick it up?
>
> Mr. Chambers. He could serve another year of satisfactory service. When he has acquired 20 years of satisfactory service he would be qualified.
>
> *Id.* at 67

Since there was no point system prior to the enactment of the legislation, there was no way to measure satisfactory past service. The challenged proviso addressed itself to this situation. The proviso gave reservists credit for their pre-1945 service if they had active wartime duty. It recognized and rewarded the service of certain reservists which was performed before

the legislation was enacted creating the point system. It created a system to credit otherwise unmeasurable years of service.[4] By the same token, the proviso contemplated that those individuals who served before 1945 but did not see active wartime duty would not receive any credit for that pre-1945 service. A colloquy between Major General John Dahlquist, the Army's Chief spokesman, and Senators Byrd and Maybank makes plain that the Senate's exclusive concern was with measuring credit for years of service.

> General Dahlquist. To qualify for the future, a year of satisfactory service, the man has to have 50 points. . . .
>
> Senator Byrd. How about the past, sir?
>
> General Dahlquist. The past, he gets credit for that as our records show that he was a satisfactory reserve officer; he gets credit for each year that he was a reserve officer.
>
> * * * *
>
> Senator Maybank. If they have not been in the war, you said they did not get *credit*.
>
> General Dahlquist. That is right. . . .
>
> (Emphasis added) *Id.* at 69

Senator Maybank's use of the word "credit" is crucial. He could not have made it any plainer that by the proviso, pre-1945 non-wartime service simply could

[4] Of course, the twenty satisfactory years of service of Mr. Fioto and his class *after* 1945 are sufficient to entitle them to retired pay, and those persons are not in need of any credits for their *additional* service in the reserves prior to 1945.

not be "credited" under the point system.[5] The concept of credit is fundamentally at odds with the notion of a perpetual bar.[6]

Finally, Senator Maybank made it unmistakably clear that no reservist who satisfied the standards for twenty

[5] The statement of General Dahlquist which is cited in Appellant's brief at p. 11 is not inconsistent when taken in the context of his entire answer. In essence he is explaining why pre-1945 years are counted as *satisfactory* only if there is wartime active service. He does not indicate that those years should act as a perpetual bar to someone with 20 years of satisfactory service after 1945.

> General Dahlquist. Our first objective is an incentive for the future.
>
> However, we face this practical situation that we have thousands of men who were responsible for the fact that we were in a position to have a Reserve unit without which we could not have mobilized so that part of the incentive to the future is to show that this Nation at least is grateful to all those men who did something in the past.
>
> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.
>
> Senate Hearing, *supra* at 29

Equally, the concept of "qualification" mentioned by Senator Gurney and cited in Appellant's brief at p. 11 refers to the barrier created by the proviso against the earning of credits for pre-1945 years of service where the individual had no active wartime duty.

[6] As is pointed out in the *amicus curiae* brief of the U.S. Merchant Marine Academy Alumni Association, the wording of the proviso as adopted in 1948 is not inconsistent with the "credit" concept. The original statute's proviso precluded "retirement benefits." (Pub. L. No. 80-810 §302(a), 62 Stat. 1087 (1948)) In other sections of the statute the "right to accrue retirement benefits under this title" refers to the right to get *credit* for years served (*Id.* at §304). When statutes relating to Armed Forces were codified in 1956 (70 A. Stat. 102) the words "retirement benefits" in the proviso were changed to "retired pay" (10 U.S.C. §1331(c)). However, the legislative purpose of the codification was to reinstate the law without substantative change. 70 A. Stat. 640.

years of satisfactory service set forth in 10 U.S.C. §1332 was to be singled out for denial of benefits.[7]

> Senator Maybank. I want the information for the record. There is no discrimination whatsoever in this bill against any enlisted man, if he not be promoted or anything else, so long as he carries out his 20 years and earns his 50 points.
>
> *Id.* at 67.

To have intended the proviso to raise an absolute and irrevocable bar against entitlement for retired pay against some individual who had performed twenty satisfactory years of service would have fundamentally altered the basic congressional purpose of the Act to award such benefits to persons with twenty satisfactory years of service. Far from containing the clear indication of legislative intent that would be expected if Congress had meant by the proviso to alter the basic purpose of the Act, the legislative history reflects, on balance, a congressional intention to award benefits to reservists who, like Mr. Fioto, had twenty years of satisfactory service and an intent by the proviso only to deny to a man with pre-1945 reserve service, but no active war-time duty, eligibility for credit toward retired pay for those pre-1945 years.[8] Thus, in construing

[7] By the 1958 amendment to the Act (H.R. 781, 85th Cong. 1st Sess.), Congress extended credit for their non-active pre-1945 service to reservists who performed active duty in the Korean conflict (June 27, 1950 - July 27, 1953), and thus enabled such of those reservists who otherwise would not have had twenty years of satisfactory service to obtain sufficient credits to secure entitlement for retired pay. Of course, no similar ameliorative amendment was necessary for men like Mr. Fioto who in any event had twenty satisfactory years of post-1945 service.

[8] As the District Court held, "[w]e need not and should not defer to the Army's construction of §1331(c) when that construction is at odds with Congress' clear purposes and goals in enacting the statutory scheme of which §1331(c) is just a part." (J.S.. App. A, 7a-8a)

congressional intent here, this Court should give effect to the plain purpose of the Act to award benefits to a man like Mr. Fioto with twenty satisfactory years of service after 1945 rather than bowing, as the Government urges, to any contrary literal reading of the proviso which is so fundamentally inconsistent with congressional purpose. *Train* v. *Colorado Public Interest Research Group, supra; Cass* v. *United States, supra; United States* v. *American Trucking Association, supra.*

In the face of the plain congressional purpose of the Act, as reflected in the legislative history, to give retired pay to all reservists with twenty satisfactory years of service, any construction of the proviso which would bar retired pay to Mr. Fioto and members of his class would be so totally at odds with the actual congressional purpose as to violate basic due process principles of the Fifth Amendment's Due Process Clause.

POINT II

IF CONSTRUED TO BAR IRREVOCABLY ENTITLEMENT OF PLAINTIFFS TO RETIRED PAY UNDER THE ACT, THE PROVISO, ON ITS FACE AND AS APPLIED, CREATES IRRATIONAL CLASSIFICATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

It is undisputed that if Mr. Fioto's service in the National Guard had been limited to the years 1947 to 1967, he would be entitled to retired pay. However, the Government contends that Mr. Fioto's additional years of earlier service from 1933 to 1940 bar him from all benefits.

As plaintiffs have amply demonstrated in Point I, *supra*, the challenged proviso at 10 USC §1331(c) must be construed so as not to frustrate the manifest congressional purpose of the Act to award retired pay to reservists like Mr. Fioto who have twenty satisfactory years of service after 1945. If, as the Government urges here, the proviso is construed to constitute a perpetual bar to entitlement for any retired pay for a reservist like Mr. Fioto who has twenty satisfactory years of post-1945 service, merely because he had *additional* pre-1945 years of service without wartime active duty, the proviso must be found unconstitutional.

If construed restrictively as a perpetual bar preventing Mr. Fioto from receiving retired pay, the proviso creates utterly irrational classifications between similarly situated persons. On the one hand, a person the same age as Mr. Fioto who has performed twenty satisfactory years of service after 1945 with no wartime active duty, but who had no reserve service before August 16, 1945, is entitled to receive retired pay. On the other hand, Mr. Fioto, who like his counterpart performed twenty satisfactory years of service after 1945 with no wartime active duty, but who was "unfortunate" enough to have rendered *additional* years of service in the reserve before August 16, 1945, would automatically, irrevocably, and pertpetually be barred from every becoming entitled to retired pay. The two persons are identically situated in every relevant respect. Both men are the same age. Thus the congressional purpose asserted by the Government to induce younger men to enlist or re-enlist in the National Guard or Reserve (Government's Br. at 13-18) cannot support the distinction.[9] Neither man had any active duty in World

[9]The objective of inducing young men to enlist in the Reserve is separately secured by the statutory requirement that the twenty years of service which entitle a reservist to retired pay must be accumulated prior to the mandatory retirement age of sixty years. See Government's Brief at 16.

War I or World War II.[10] Hence, the congressional purpose asserted by the Government to encourage men with wartime experience to enlist or re-enlist in the Guard or Reserve (Government's Br. at 14) cannot support the distinction. Finally, neither man performed *any* active wartime duty, either in World War I or II or in the Korean conflict.[11] Thus, the congressional purpose asserted by the Government to reward those reservists and guardsmen who had served on active wartime duty (Government's Br. at p. 18-21) cannot support the distinction.[12] The only difference in the

[10]Among the findings of fact made by the District Court was that Mr. Fioto did not serve in World War II because of injuries resulting from an automobile accident, and that he did not participate in the Korean War since his unit was never called to active duty (J.S., App. A, at 2a). On this appeal, the Government for the first time seeks to put into issue the reason for Mr. Fioto's non-participation in World War II, by lodging with The Clerk of this Court a portion of Mr. Fioto's Army personnel record. Clearly this is improper under the well-settled principle that this Court will not accept evidence offered for the first time on appeal. *Morrisey* v. *Brewer*, 408 U.S. 471 (1972); *Henneford* v. *Northern Pac. Ry. Co.*, 303 U.S. 17 (1937). In light of the circumstances, it is not inappropriate to observe further that if the Government had seen fit to put into issue in the District Court the reason for Mr. Fioto's non-service during World War II, Mr. Fioto would have testified that because of the injuries sustained in his automobile accident he was unsuccessful in his efforts to enlist during World War II.

[11]The 1958 amendment to the proviso (H.R. 781, 85th Cong. 1st Sess.) did nothing to cure or dilute the irrationality of the classifications created by the original proviso, since it only granted credit for pre-1945 non-wartime years of service for reservists who later performed active duty in the Korean conflict.

[12]Further, the objectives of the Act and of the proviso which are asserted by the Government do not constitute the actual congressional purpose of the Act to create an incentive to continued, long term reserve service for trained reservists and of the proviso to credit the pre-1945 years service of reservists who had seen active wartime duty and not to credit those years for those who had no wartime duty. See POINT I, *supra*.

circumstances of the two men is that Mr. Fioto has *additional* years of service in the reserves before 1945. That distinction not only cannot rationally support a law which would deny benefits to Mr. Fioto while giving them to his counterpart, but, indeed, if anything, argues for more favorable treatment for Mr. Fioto. However, by this suit, Mr. Fioto seeks not *preferential* but rather only *equal* treatment as compared to those persons similarly situated to him.[13] He seeks only to avoid, as the District Court observed, "being penalized for having devoted seven additional years to the service of his country." (J.S., App. A, at 5a).

The classifications created by the proviso, if given the Army's construction, between Mr. Fioto and other similarly situated reservists are thus utterly without rational basis.

If the proviso is construed to bar entitlement to retired pay for reservists with pre-1945 service who had performed no active wartime duty, the only reasonable conclusion that can be drawn is that, as stated by Circuit Judge Lumbard in the court below, "Congress simply never anticipated a situation such as Fioto's," (J.S., App. A at 7a)[14] whereby he had twenty satisfactory years of service after 1945 in addition to pre-1945 years of non-wartime service. The only constitutional conclusion that can be drawn is that the proviso, if interpreted as a bar to retired pay for the

[13]As observed earlier, p. 14, fn. 4, Mr. Fioto does not seek, and does not require, credit for his years of service in the reserve *before* 1945 in order to achieve the twenty satisfactory years of service which Congress intended to entitle him to retired pay.

[14]Anomalously, up to the time of this appeal, the Government had given the same reading as the plaintiffs' to this aspect of the legislative history, and had admitted Mr. Fioto's situation to have been a legislative oversight. (J.S. App. A at 7a).

plaintiffs, creates classifications which are not rationally related to legitimate congressional goals and hence violate the equal protection and due process principles of the Fifth Amendment's Due Process Clause. *See generally*, *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971).

POINT III

ONCE 10 U.S.C. §1331(c) IS DETERMINED NOT TO BAR ELIGIBILITY FOR RETIRED PAY, MR. FIOTO AND HIS CLASS ARE ENTITLED PURSUANT TO FEDERAL STATUTE TO RETIRED PAY AS OF THE DATE STATUTORY REQUIREMENTS WERE MET BY EACH MEMBER OF THE CLASS.

The Government now suggests that if 10 U.S.C. §1331(c) does not constitute a bar to entitlement to retired pay, the District Court nonetheless lacked the power to enter a judgment against the defendant Secretary of the Army for retroactive retired pay for the plaintiff and plaintiff class members as of the date each satisfied the statutory requirements under the Act. Specifically, the Government characterizes that part of this suit which seeks payment of retroactive retired pay to plaintiff and plaintiff class members as a claim for money damages against the United States pursuant to the Tucker Act, 28 U.S.C. §1346, and argues that the United States is thus an "indispensable party" here and, in any event, enjoys sovereign immunity from such a monetary claim.

The Government's position is without merit. The short answer to its contention is that, as found by the District Court (J.S., App. A, at 3a-5a), the plaintiffs by

this action do not seek a money judgment pursuant to the Tucker Act, but rather seek mandamus relief pursuant to 28 U.S.C. §1361 to compel the Secretary to perform his statutory (Point I) or, alternatively, constitutional (Point II) duty to pay the plaintiff and plaintiff class members the retired pay to which they are entitled under the Act. Sovereign immunity constitutes no bar to such a suit against a governmental official since the plaintiffs contend that in denying them retired pay the Secretary is acting beyond his statutory powers or, alternatively, pursuant to an unconstitutional statute. *Dugan* v. *Rank*, 372 U.S. 609, 621 (1963); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962).[15] Accordingly the particular governmental official–here the Secretary of the Army–who aggrieved the plaintiff is a proper party defendant in such a suit.

Finally, upon analysis, it is clear that sovereign immunity is not available to the Secretary as a defense to the District Court's award of retired pay to the plaintiff and plaintiff class members. In *United States* v. *Testan*, 424 U.S. 392 (1976), this Court held that in a suit seeking in part money payments from the federal government, a waiver of the traditional sovereign immunity of the United States is effectuated by the

[15]The Government claims that allowing public officials to be sued when they act outside their statutory authority or unconstitutionally does not pertain to a claim where payment of money by the sovereign is required. (Appellant's Brief at 24 fn. 17 citing *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, (1948)). However, in *Larson*, this Court only states that a suit may fail if the relief requested cannot be granted by ordering the cessation of the official's conduct, but requires an affirmative action by the sovereign or disposition of its property. *Id.* at 691, fn. 11. Here Plaintiffs seek that the Secretary of the Army cease applying the unconstitutional bar and therefore benefits flow from the date of statutory entitlement (10 USC §1331(e)).

existence of an express federal statutory provision making the government liable for the particular pay sought. In the instant case, the government's sovereign immunity from suit for the retired pay due the plaintiff and his class, once 10 U.S.C. §1331(c) is construed or constitutionally adjudicated not to constitute a bar thereto, is thus waived by 10 U.S.C. §1331(a) and (e)[16] which expressly entitle a person to properly computed retired pay as of the date he has satisfied the requirements of sub-section (a).[17]

[16]10 U.S.C. §1331(e), is set forth at p. 2 of this Brief.

[17]The District Court predicated its jurisdiction on 28 U.S.C. §1361. The plaintiffs additionally alleged that the District Court had jurisdiction over this action pursuant to, *inter alia*, the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* As an alternative basis for concluding that sovereign immunity constitutes no bar to this suit, this Court should find that the Administrative Procedure Act confers subject-matter jurisdiction over this suit, *Coulter* v. *Weinberger*, 527 F.2d 224 (3d Cir., 1976); *Pickus* v. *U.S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir., 1974); *Ratnayake* v. *Mack*, 499 F.2d 1207 (8 Cir., 1974); *Sec'y. of Labor* v. *Farino*, 490 F.2d 885 (7 Cir., 1973), and constitutes a general waiver of sovereign immunity in actions seeking judicial review of federal administrative action. *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F.2d 663 (2 Cir., 1973); *Scanweld Laboratories* v. *Shaffer*, 424 F.2d 859 (D.C. Cir., 1970); *Estrada* v. *Ahrens*, 296 F.2d 690 (5 Cir., 1961).

Significantly, by Public Law 94-574, 90 Stat. 2721, enacted October 21, 1976, Congress amended 5 USC §§702 and 703 to make it explicit that an action seeking relief in the nature, *inter alia*, of mandamus against an officer or agency of the United States "shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party," and to permit the action to be brought against the United States, the agency, or the officer.

CONCLUSION

The unanimous judgment of the three-judge District Court should be affirmed.

Respectfully submitted,

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